

The Doctor in the Middle

Where Does the Physician Stand—in Law and in the Patient's Eyes—When He and the Patient's Insurance Company Disagree on Whether a Fee Is "Reasonable or Customary?"

The following letter, written by legal counsel for the California Medical Association in reply to a specific inquiry made by the medical insurance committee of a county medical society, bears upon a point of general interest to physicians.

. . . . You inquire whether, under major medical insurance policies, the patient remains liable for any unpaid balance of the fee remaining after the insurance carrier has paid its contractual liability.

I believe that an adequate answer to your question requires a review of the legal basis on which physicians' fees are erected, as well as the legal rights and duties of insurance carriers under various types of health insurance contract. Please bear with me.

1. *Physician and patient—fees:*

As between physician and patient and absent any other factor or person, the law applicable to fees is as follows:

(a) *Express contract:* Either in advance of services or thereafter a physician and patient may enter into an express contract (oral or written) fixing the physician's fee, and such a contract is legally enforceable *unless* it was entered into by the patient under duress, coercion, misrepresentation or other circumstances amounting to fraud. Such a contract need not be in writing, although if it is oral there is always the possibility of subsequent dispute as to its terms.

(b) *Absence of express contract:* If an express contract has not been entered into, then the law *implies* a promise on the part of the patient to pay a "reasonable fee." The law defines the term "reasonable" or "reasonable value" as being the result reached after giving effect to four factors, viz. customary charges in the community for similar services, the time and attention involved, the professional standing and skill of the physician and, finally, the ability of the patient to pay. In the event there is a dispute between physician and patient and a suit for fees is instituted, the foregoing are the legal factors that the court will take into account in reaching a decision.

(c) *Special circumstances:* There are situations in which a physician's fee is fixed by law or third party contract. A physician undertaking an industrial case at the instance of an employer or em-

ployer's insurance carrier is legally bound to arrange a fee with the employer or insurer. A physician may expressly contract to accept a given fee, as in the instance of C.P.S. physician membership. The patient may have a benefit that is only available to the patient if the physician accepts such benefit as full payment, as in the case of Medicare. These are all special circumstances.

2. *Insurance against physicians' fees:*

(a) The ordinary health insurance contract is one in which the insurance carrier agrees with the insured (patient) to pay fixed amounts (e.g. appendectomy, \$150) in the event the insured incurs expense for covered services. This is a contract *exclusively* between the insurer and the insured; unless the physician gives his express consent, the indemnity payment does not govern his fee.

(b) *Major medical insurance:* Commencing about five years ago, insurance carriers began to issue contracts not specifying specific indemnities but instead containing a clause under which the insurer agrees to pay all or a percentage (e.g. 80 per cent) of "the reasonable and customary" fee for the service rendered. This so-called open-end or "comprehensive type" of contract requires the insurance carrier to make a decision in each claim as to what is "reasonable and customary."

It was this type of contract that was the subject of Insurance Commissioner McConnell's letter that was published by the Los Angeles County Medical Association *Bulletin** and which you attached to your letter. Mr. McConnell points out that since the insurance carrier has agreed only to pay a "reasonable and customary" fee, the carrier is not bound by any express contract that may be entered into between the patient (insured) and the physician. This is unquestionably on the theory that the express contract may not coincide with that which is "reasonable and customary." By the same token,

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the physician is not bound by the insurance carrier's decision of what is "reasonable and customary," because the physician is not a party to the contract between the insurer and the insured (patient). If a physician has made an express contract (absent fraud or other legal impairment) such express contract is still valid and enforceable, regardless of the existence of a major medical type insurance policy.

The real problem arises when there is a difference of opinion between the insurance carrier and the physician as to what is "reasonable and customary." While under the law this is the proper test for the physician to use (absent an express contract), and under the insurance contract is the proper test for the insurance carrier to use, it is quite possible and often happens that the two do not agree on the conclusion. This impasse on occasion causes the middle party, viz. the patient, to be completely confused, as he receives conflicting opinions from two sources, with *both* of whom *he* does have a contract.

Legally, both the insurance carrier and the physi-

cian have the right to set forth that which they consider to be "reasonable and customary," and the patient (insured), if he disagrees, then has the right to cause the issue to go to court, where the tests that I outlined above would be applied. This procedure is obviously untenable for the continuing good relations of both the insurance industry and Medicine, but under the contract terms used in major medical contracts it is an inevitable situation.

Legally, as stated, the physician is not bound by the insurance carrier's decision as to what is reasonable and customary. Practically, physicians frequently find themselves in a defensive position with their patients, because the insurance carrier decided on an amount less than that charged by the physician.

I believe it is essential that some solution be found to the problems created by two entirely different persons making an independent decision on the same point. I hope that your committee may be able to assist in this solution.

Deductibility of Traveling Expenses

PHYSICIANS TODAY are frequently importuned to sign up for "tours" or "postgraduate courses" in foreign lands under the suggestion or statement that the expenses of the trip are an allowable tax deduction. While other professional and business men are similarly lured by the promoters of such trips, the physician is a prime target because (1) he usually plans a more leisurely vacation than many, (2) he is constantly interested in advancing his scientific knowledge and (3) he can generally afford the cost of overseas or distant travel.

While this type of promotion has been going on, the Internal Revenue Service has been tightening up its restrictions and its requirements to qualify expenses of this type of travel for tax-deduction purposes. This is one of the many areas of "tax loopholes" which the IRS is seeking to plug. Unfortunately, some physicians have learned this the hard way.

Section 162 of the Internal Revenue Code of 1954 makes express provision for the deductibility of certain expense items which are classed as "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." Such expenses include "traveling expenses (including the entire amount spent for meals and lodging) while away from home in the pursuit of a trade or business."

Please note that the expense must be *ordinary*, that it must be *reasonable*, that it must be *necessary*,

that it must be *incurred away from home* and that it must be *in pursuit of business*. Unless a physician's travel expenses meet *all* these requirements, they are not legally tax-deductible.

"Away from home" in this section of the law means away from your normal place of business, the word "place" embracing the general area where your business is transacted. "Overnight" means that the extent of the business must be great enough to require the taxpayer to be forced to seek sleep in another area as a relief from duty.

We are speaking here of travel expenses, not the ordinary expenses of carrying on a medical practice, such as maintaining an automobile. The latter is, of course, a deductible business expense.

"Pursuit of business" means that the taxpayer must prove that his travel expenses are directly connected with, incident to and proximately resulting from his business or profession. Further, he must prove that such expenses were necessary or appropriate to the development or pursuit of his business. Even though such expenses may be claimed as deductibles, they will not be allowed if the real purpose of the trip appears to be for personal pleasure or vacation purposes.

This aspect of the tests for deductibility is likely to plague physicians who travel to another continent, attend medical meetings or lectures while overseas and engage in sight-seeing or other personal pursuits during the course of the same visit. The IRS investigators will want to know how much time the entire trip occupied, how much of that time was spent in *bona fide* professional pursuits and how much in